(5)

No. 89-152

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

VERA M. ENGLISH,

Petitioner,

v.

GENERAL ELECTRIC COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENT'S SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF OF THE UNITED STATES

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RESPONDENT'S SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF OF THE UNITED STATES

Respondent, General Electric Company ("GE"), submits this supplemental brief in response to the brief of the United States filed on January 2, 1990.

1. The most noteworthy and disturbing aspect of the Government's brief is the fact that it does not even mention pending legislation that will likely resolve the preemption issue presented by English's petition. This silence is particularly surprising because the Department of Labor, which participated in preparation of the Government's brief, has taken a strong position before Congress that federal whistleblower legislation *should* preempt state claims.

The proposed bills, each entitled the "Employee Health and Safety Whistleblower Protection Act," were introduced in the Senate (S. 436) on February 23, 1989, and in the House (H.R. 3368) on September 28, 1989. As introduced, both the House and Senate bills expressly provided that the federal legislation would not preempt rights and remedies under state law. S. 436, § 8(b); H.R. 3368, § 8(b). Hearings have been held on both bills,[1] and the Department of Labor has specifically opposed the non-preemption provision (see discussion *infra*). Whatever the outcome on the preemption issue, it now appears that a comprehensive whistleblower statute specifically addressing the question of preemption will be enacted during this session of Congress.

These legislative developments are important to the instant case for two reasons. First, preemption is ultimately a question of Congressional intent,[2] and the Court's preemption determinations are made infinitely more difficult when confronted with a statute that has no express provision regarding its intended preemptive effect. Here, however, the preemption issue facing the Court will likely be authoritatively resolved by Congress before the Court addresses the merits of this case. These facts, coupled with the existence of only the most minimal conflict (if any) in the courts below (see GE Brief in Opposition, pp. 20-22), suggest that the Court should not expend its limited resources considering this case.

Second, the Government's brief to this Court argues that there is no principled basis for concluding that Sec-

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[1] Hearings on S. 436 were held in March 1989 before the Senate Subcommittee on Labor of the Committee on Labor and Human Resources. Hearings on H.R. 3368 were held in November 1989 before the House Subcommittee on Labor-Management Relations of the Committee on Education and Labor.

[2] *E.g., Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282, 290 (1986).

tion 210 of the Energy Reorganization Act (42 U.S.C. § 5851) preempts state actions by whistleblowers like English. Inexplicably, however, that brief fails to mention that within the past several months the Department of Labor has twice argued to Congress that there are compelling reasons supporting preemption. And those reasons are precisely the basis upon which this Court should conclude that Congress intended that Section 210 preempt state actions.

Thus, in an August 14, 1989 letter to Senator Howard Metzenbaum, Secretary of Labor Dole stated that "[t]he Administration believes that, in order to preclude duplicative State law proceedings, any legislation explicitly should preempt State whistleblower claims premised on State statutes and common law."[3] Later, in testimony before the House Subcommittee on Labor-Management Relations on November 16, 1989, Solicitor of Labor Davis reiterated that view and explained the policy reasons for the Department of Labor's positions on the pending legislation:

> We must consider the proper balance to strike in the context of a uniform law between the need to protect responsible whistleblowing and the need to ensure that employers retain the right to take legitimate disciplinary actions.
>
> * * * *
>
> In defining protected conduct, the proper balance must be struck between the right of an employee to engage in whistleblowing and the right of an employer to control the workplace. We want to be sure that legitimate whistleblowing is protected. We also want to be sure that statutory protections cannot be used to shield employees who are disciplined or discharged for legitimate reasons.
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> * * * *

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[3] Letter of Secretary Dole to Senator Metzenbaum, Chairman of the Senate Subcommittee on Labor, August 14, 1989, p. 5a. A copy of Secretary Dole's letter is set forth in the Appendix to this brief.

> Although we have other concerns with this legislation, I believe I have provided enough examples to illustrate for you the type of issues that need to be addressed if we are to move from a limited number of narrow and non-uniform Federal whistleblower laws—*in each of which the Congress struck a balance, for a specific employment situation, between responsible whistleblowing and the right of employers to take legitimate disciplinary action*— to a uniform, broader approach that would apply one set of rules to multiple industries and circumstances.

Statement of Robert P. Davis, Solicitor of Labor, submitted to the House Labor-Management Relations Subcommittee, November 16, 1989, pp. 1, 6, 6-7 (emphasis added).

In enacting Section 210 Congress struck the precise balance the Solicitor supports. Congress, in the interest of nuclear safety, protected nuclear whistleblowers but, equally important, it removed those protections for whistleblowers, such as Petitioner, who threaten the safety of fellow employees and the public by deliberately violating nuclear safety standards. Section 210(g).

In short, Congress intended that nuclear industry employers should not be dissuaded by threats of litigation and liability from disciplining or discharging employees whose deliberate actions create nuclear safety hazards. The Department of Labor agrees. See *Wood and Yeargin Construction Co.*, 79-ERA-3, slip op. at 8-9 (Secretary's Decision, November 8, 1979) (dismissing a § 210 complaint by an employee who had violated safety regulations because "[i]n view of the risk to the plant and public offered by [his] propensities, his discharge was overdue when it occurred"). So do the federal courts:

> [A] wrongful discharge action may also have undesirable effects. . . . There is a danger that the always uncertain prospects of litigation will deter employers in [sensitive] industries from legitimate personnel decisions, even with respect to those employees whose . . . [actions] in the workplace pose[] a variety of public risks.

Guy v. Travenol Laboratories, 812 F.2d 911, 916-917 (4th Cir. 1987).

In light of the foregoing, it is surprising that the Government saw no need to advise this Court of the pending legislation or to alert the Court that the Administration had taken a position favoring preemption for precisely the same reasons that would support a preemption finding in this case.

2. Aside from bringing to the Court's attention the foregoing glaring omission from the Government's brief, we have but a few comments regarding the Government's arguments.

a. First, the Government's brief assumes that Congress' sole purpose in enacting Section 210 was to deter nuclear employers from disciplining or discharging nuclear whistleblowers. Based upon that assumption, the Government concludes that the availability of additional state remedies (including exemplary damages) furthers Congress' single objective. E.g., Government Brief at 7, 9-10, 14, 15. However, the Government cannot simply write off Section 210(g) and the lack of exemplary damages and thereby argue that Petitioner's state action is not preempted.

On the first point, the Government argues that Section 210(g) does not support preemption, but rather that 210(g) provides only an affirmative federal defense in state court actions. Government Brief at 9. In making this argument, however, the Government effectively recognizes that the nuclear safety considerations underlying Section 210(g) are controlling. That being the case, the key question is whether such nuclear safety issues should be considered and decided by the Secretary of Labor in

consultation with the Nuclear Regulatory Commission, or by judges and juries in the 50 states. Clearly, Congress committed those judgments to the Secretary, and there they should exclusively remain.[4]

On the second point, the Government suggests that Congress made no "informed judgment" to withhold exemplary damages because Section 210 does authorize the award of exemplary damages against an employer that fails to abide by a decision of the Secretary of Labor. Brief at 9-10. That argument highlights the Government's failure to appreciate Congress' balanced purposes in enacting Section 210. Congress provided for no exemplary damages to a discharged employee in order to remove that disincentive for an employer to discipline or discharge a nuclear safety violator. The fact that Congress authorized possible exemplary damages against an employer who acts in contempt of a Department of Labor order acts as no disincentive to an employer to discharge a dangerous employee—it acts only as a disincentive to act in contempt of the Department of Labor.

b. Second, and despite the Government's contrary assertion (Brief at 14-15), the fact that the ERA preempts all state activity in the nuclear safety field[5] lends support to the conclusion that Congress intended that

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[4] See *Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 635-636 (1975):

> Although we hold that the union's agreement with Connell is subject to the federal antitrust laws, it does not follow that state antitrust law may apply as well. . . . In this area, the accommodation between federal labor and antitrust policy is delicate. Congress and this Court have carefully tailored the antitrust statutes to avoid conflict with the labor policy. . . . State antitrust laws generally have not been subjected to this process of accommodation. . . . Permitting state antitrust law to operate in this field could frustrate the basic federal policies . . . Congress has created. . . .

[5] *Pacific Gas & Electric Co. v. Energy Resources Comm'n*, 461 U.S. 190 (1983).

Section 210 (which the Government concedes is part of the nuclear safety provisions)[6] preempts state actions. It is true, as the Government argues (Brief at 12, n.8), that there may be less reason to find preemption in statutes which established a partnership between the federal government and states—such as cooperative efforts in the field of environmental regulation. On the other hand, where a federal statute, like the ERA, creates no such partnership but, instead, otherwise preempts all state action, there is good reason to conclude that its employee protection provisions which further the basic purpose of the preemptive statute (here, nuclear safety) also preempt state actions by employees and former employees.

c. Third, when the balanced Congressional purposes underlying the enactment of Section 210 are understood, there is no basis for the Government's argued distinction between preempting a state claim for wrongful discharge and a state claim for "intentional infliction of severe emotional distress." Government Brief at 14 n.9. The spectre of either type of state action, with the possibility of punitive damages, deters employers from making disciplinary decisions in furtherance of nuclear safety concerns. Thus, where, as here, the complaining employee premises her entire claim on an alleged retaliation against her whistleblowing activities, there can be no real distinction between that claim and a wrongful discharge claim. Indeed, the Government's brief elsewhere recognizes and argues that the District Court appropriately considered both such claims by English as indistinguishable for preemption purposes. Brief at 16-17 and n.13. And when that distinction is stripped away, even the Government considers that English's state claim in this case may be preempted. Brief at 14, n.9 ("A complaint alleging wrongful termination . . . might raise a more difficult preemption issue than that presented here.").

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[6] See Government Brief at 7, 13.

d. Finally, this case does not present a clear conflict with the First Circuit's decision in *Norris v. Lumbermen's Mut. Casualty Co.*, 881 F.2d 1144 (1st Cir. 1989). The First Circuit noted that there was no Section 210(g) issue of a deliberate safety violator in that case, so that any state law conflict with that subsection was merely speculative. 881 F.2d at 1150. Here, there is no need to speculate. Petitioner's complaint in this case alleges that she deliberately left a radioactive spill in her work place. The potential for state law conflict here is not speculative—it is real. Thus, although the Government attempts to downplay this distinction, it is a distinction that here exists and that the *Norris* decision itself found significant.

In short, and for the additional reasons stated in our Brief in Opposition (at pp. 20-22), there is no conflict in the lower courts sufficient to warrant certiorari. And this is particularly true in light of the Congressional activity now underway which should settle, one way or the other, the preemption question at issue in this case.

CONCLUSION

The Petition for a Writ of Certiorari in this case should be denied.

Respectfully submitted,

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Dated: January 11, 1990

APPENDIX

APPENDIX

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
Washington, D.C.

August 14, 1989

The Honorable Howard M. Metzenbaum
Chairman
Subcommittee on Labor
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your request for our views on S. 4[illegible] the "Employee Health and Safety Whistleblower Protection Act." The Administration shares the interest and concern which you and Senator Grassley have regarding the improvement of whistleblower protections for private sector employees subject to Federal safety and health activities.

The Administration has analyzed the record of your hearings on S. 2095 and S. 436, as well as our own experience, and after careful review, the Administration has significant comments and concerns regarding provisions of S. 436. Certain of these comments and concerns are presented here; in addition, we understand that the Department of Justice will submit a separate letter to you, discussing several issues in greater detail. In light of these concerns, the Administration could not support S. 436 in its current form.

SCOPE OF WHISTLEBLOWER PROTECTION

We believe that coverage of whistleblower protections should be provided only for Federal safety and health activities specifically identified as programs which would be enhanced by such coverage. We are concerned that a generic approach to whistleblower protection, although it is an attractive goal, could result in some unnecessary, duplicative or inappropriate Federal coverage.

Consistent with the principle of tailoring whistleblower protection, Congress has evidenced a clear intent in the past to provide broad whistleblower protection only in connection with certain Federal occupational, environmental and public safety and health statutes. Largely as a result of the broad coverage of the Occupational Safety and Health Act of 1970, whistleblower protection generally is provided in connection with Federal *occupational* safety and health statutes. Moreover, through a number of specific enactments, whistleblower protection generally is provided in connection with Federal *environmental* safety and health statutes. While legislation may be appropriate to eliminate gaps or uncertainties in the occupational and environmental contexts, such gaps should be identified and explicitly covered by any new legislation.

Protection is currently more limited in the broader range of Federal *public* safety and health statutes. Some of the Federal programs subject to these statutes, whose general focus is on preventing hazards to the public, may be furthered by Federal whistleblower protection. Based on our review to date, we believe that the addition of such whistleblower protection could be appropriate in several statutory areas, including:

1) aviation safety requirements regulations administered by the Federal Aviation Administration, in order to reassure the public that air travel is safe;

2) food safety and sanitation requirements administered by the Food and Drug Administration and

the Department of Agriculture, in order to reassure the public that the quality of the nation's food supply is being maintained;

3) drug safety requirements administered by the Food and Drug Administration, in order to reassure the public that our pharmaceuticals are safe; and

4) the Consumer Product Safety Act and related requirements administered by the Consumer Product Safety Commission, in order to reassure the public that consumer products are safe.

The Administration is willing to explore with your Committee whether it would be useful and practicable to add whistleblower protection to other Federal public safety programs. We believe, however, that limited Federal resources ought to be utilized in those situations where such protection clearly is needed most.

Depending on the final form of any whistleblower legislation, it may be necessary for the Department to seek an increase in the resources available for enforcement. Before we can determine whether we would be able to absorb additional workload within current budget levels or would require more resources, we will need more information on projected activity under the legislation. While we of course want to be sure that the Department can perform the tasks which it is assigned by Congress, any increase necessary for this program may have to be offset by corresponding reductions elsewhere in the Department.

UNIFORMITY IN ALL WHISTLEBLOWER LAWS FOR A 180-DAY STATUTE OF LIMITATIONS AND PROVIDING DOL WITH SUBPOENA POWER

One of the issues presented by this legislation is the extent to which the protections and procedures of all existing (as well as proposed) safety and health whistleblower programs should be made uniform. We agree with the

Administrative Conference of the United States (ACUS) that legislation is appropriate to ensure that all such programs should have a uniform, 180-day statute of limitations. Some laws cut off the right to file a complaint after only 30 days. We believe that limitation periods shorter than 180 days have proved too short for effective protection of whistleblower rights.

Moreover, we agree that the Department of Labor should be provided with explicit subpoena power, consistent with constitutional constraints, to support its investigative and adjudicative responsibilities under all such programs already administered by this Department. To the extent that S. 436 could be construed as exceeding those constraints, we would urge that the subpoena provisions of the bill be revised. This issue will be discussed in greater detail in the letter to be submitted to you by the Department of Justice.

S. 436 would make these two changes, and only these two changes, to existing Federal safety and health whistleblower programs, and accordingly has our support in this regard.

DUPLICATIVE AND ADDITIONAL WHISTLEBLOWER COVERAGE SHOULD BE DISALLOWED

It is important that any new legislation be crafted carefully to avoid duplicative or additional whistleblower coverage. Employees currently protected by existing Federal safety and health whistleblower laws, including Federal government employees, should be excluded from coverage by any new program, to avoid conflicting, competing or inconsistent whistleblower protection.

Section 3(2)(B) of S. 436 specifically provides that its provisions only apply to an individual who has "no remedy" under one of the existing safety and health whistleblower protection laws listed in section 3(4) of the bill.

This formulation is very ambiguous. It could, for example, be interpreted to mean that an individual who does not enjoy a specific type of relief under one of the existing statutes could utilize the protections and procedures of S. 436.

As noted above, we oppose creating dual or additional coverage for an employee whose whistleblowing concerns currently are covered by an existing Federal safety and health whistleblower program.

PREEMPTION OF STATE STATUTORY AND COMMON LAW CLAIMS

S. 436 as drafted would not preempt existing State statutes and common law claims. In fact, Sections 8(b) and 8(c) specifically state that the rights and remedies provided by S. 436 would be in addition to, and not in lieu of, protections provided by State laws or private contractual agreements. The Administration believes that, in order to preclude duplicative State law proceedings, any legislation explicitly should preempt State whistleblower claims premised on State statutes and common law. The Administration agrees that contractual rights and remedies provided to employees which afford *greater* whistleblower protection than is provided by the legislation should not be preempted. To this extent only, the Administration does not oppose the provisions of S. 436 that provide that contractual rights and remedies are in addition to the rights and remedies provided by the legislation.

PROTECTED CONDUCT MUST BE DEFINED CAREFULLY; REFUSAL TO WORK SHOULD BE CIRCUMSCRIBED NARROWLY

In defining protected conduct, the proper balance must be struck between the right of an employee to engage in whistleblowing and the right of an employer to control the workplace. We want to be sure that legitimate whis-

tleblowing is protected. We also want to be sure that statutory protections cannot be used to shield employees who are disciplined or discharged for legitimate reasons.

For example, there are good reasons to protect the right of employees to refuse to carry out duties assigned by an employer where to do so would cause a serious or life-threatening risk to the employee, to others, or to the public. Indeed, such conduct is protected under a number of existing Federal whistleblower protection statutes, and has been upheld by the Supreme Court of the United States. The parameters of such a right must be circumscribed narrowly so that it is not construed as a right to "work to the rule". We believe S. 436 fails this test, and provides an overly broad definition of the circumstances in which an employee may refuse to work. Consistent with provisions of current whistleblower laws administered by this Department, the Administration believes that the refusal to work must be conditioned on three criteria, including: 1) that there is serious, imminent danger to the employee, other workers or the public; 2) that there is no reasonable alternative to refusal to work; *and* 3) that the employee, where possible, must have sought and failed to obtain correction of the violation from the employer. The statutory refusal to work right must be limited specifically to the foregoing criteria involving genuine health and safety emergencies. S. 436 goes well beyond those criteria and, accordingly, the Administration opposes the refusal to work provisions in the bill.

CLARIFICATION OF PROTECTED ACTIVITY

We support inclusion of an explicit requirement that an employee who brings a safety or health hazard to the attention of the employer is protected from retaliation to the same extent as an employee who complains to the Government. Lack of explicit statement of such a right has forced us to litigate this issue under some existing

safety and health whistleblower programs. Also, we are concerned that there is no provision to protect exposure of classified information.

In addition, we support explicit inclusion in the legislation of a provision stating that an employee is not engaging in protected conduct when the employee deliberately causes a violation of a Federal or employer safety or health rule.

A PRIVATE JUDICIAL CAUSE OF ACTION IS NOT APPROPRIATE BEFORE COMPLETION OF ADMINISTRATIVE PROCEDURES

In order to assure the efficacy of the administrative procedures, we do not believe that complainants should have the right to institute a judicial action to redress the claims which are the subject of pending administrative proceedings. Section 5 of S. 436 allows employees whose cases are pending decision before administrative law judges a "window" in which to file suit in the District Court. No existing health or safety statute providing whistleblower protection affords the complainant with such a judicial cause of action. The majority of the statutes, e.g. the environmental statutes, Mine Safety and Health Act of 1977 ("MSHA") and the Surface Transportation Assistance Act of 1982, ("STAA") provide for an administrative hearing before an administrative law judge or other tribunal with an appeal of the final administrative decision to a federal court of appeals. The alternative existing enforcement procedures provide that the Secretary of Labor exclusively is authorized to file suit on behalf of the complainant under the other statutes administered by the Department, including the Occupational and Safety Health Act ("OSHA") and the Asbestos Hazard Emergency Response Act.

Affording complainants a cause of action before the conclusion of the administrative procedures would not serve the interests of whistleblowers, employers, or the public,

who can benefit from the well understood advantages provided by an administrative procedure. These advantages include, for example, a quicker, less burdensome and less costly procedure than is provided by judicial resolution of claims. Moreover, a private right of action would increase the already heavy burdens of the Federal courts. Based on these considerations, the Administration opposes the private right of action included in S. 436.

TEMPORARY REINSTATEMENT IS NOT APPROPRIATE IN A GENERAL WHISTLEBLOWER STATUTE

Authorizing temporary reinstatement of a complainant before the completion of the full adjudicatory process is a dramatic remedy which is inappropriate in a general whistleblower statute such as S. 436. We do not oppose reinstatement as part of a make whole remedy which can be provided as part of the relief available to a successful complainant at the final conclusion of the adjudicatory process.

Only two of the existing whistleblower statutes administered by the Department, STAA and MSHA, provide a temporary reinstatement remedy. These two statutes address industries which are regulated heavily. The inclusion of a temporary reinstatement remedy in a statute of general application is not supported by these considerations. Accordingly, the Administration opposes the temporary reinstatement remedy included in S. 436.

RECOMMENDED ADMINISTRATIVE PROCEDURE

We favor an investigation by trained personnel of complaints of retaliation by whistleblowers, followed by an administrative adjudication process for the resolution of such cases. Based on the Department's experience in administering the majority of the existing whistleblowing statutes, we believe that the administrative procedures followed for the environmental statutes offer the best model. Under these administrative procedures, com-

plaints are filed with the agency, which investigates the allegations, makes findings and attempts to conciliate the claims. Either party dissatisfied with the agency's findings can request a full Administrative Procedure Act ("APA") hearing before an Administrative Law Judge ("ALJ") of the DOL. The ALJ issues a recommended decision, which then is reviewed by the Secretary of Labor. The Secretary's decision represents final agency action, which is then reviewable by the federal courts of appeals under the APA. This process allows for the development of sound, well-considered precedent by administrative law judges and the Secretary of Labor, all of whom are familiar with the applicable law. Additionally, utilizing the administrative procedures allows for the development of the underlying facts with a less significant burden and expense being imposed on the parties.

On a related point, the Administration strongly objects to the requirement in S. 436 that the Department of Labor must intervene on behalf of an employee, where the Department's investigation of the case determines that the employee was the victim of retaliation for protected conduct, even though the employee has retained private counsel. Such a requirement imposes unnecessary duplication of efforts, may extend the administrative procedures and unnecessarily deplete the Department's limited resources.

THE TIME PERIOD FOR THE ADMINISTRATIVE PROCEDURES INCLUDED IN S. 436 ARE TOO SHORT

While the Department of Labor recognizes that it has an obligation to act expeditiously in resolving whistleblower cases—or any cases for which it is responsible—we must object to the short time periods for investigations and for Secretarial review of hearing decisions set forth in S. 436. While short time periods may be appealing to the individual with a case, both employees and employers

would be better served if the Department had adequate time to complete a full investigation of each case. The time constraint S. 436 imposes on Secretarial review of administrative law judge decisions is particularly onerous. Accordingly, the Administration must condition its support of any legislation in this area on the provision of time frames which experience has demonstrated are necessary for the proper resolution of these cases.

THE BURDEN OF PROOF SHOULD BE THE "PREPONDERANCE OF THE EVIDENCE" STANDARD

It is essential that we not establish an unreasonable burden of proof for employers in cases of mixed motives: that is, situations in which there may be both an improper motive (retaliation for protected conduct) and a legitimate motive involved in an adverse determination. After an employee demonstrates that an improper motive resulted in prohibited retaliatory action, the burden of proof is on the employer to establish that the adverse action would have taken place even absent the improper motive.

Under existing Federal safety and health whistleblower programs, the employer may avoid its liability by carrying this burden of proof by "a preponderance of the evidence." This is the same standard as the "*Mt. Healthy*" test used by the courts in cases involving conduct protected by the Bill of Rights, the National Labor Relations Act, and by Title VII of the Civil Rights Act. By contrast, S. 436 would establish a "clear and convincing evidence" burden of proof standard. This is too high a standard. This conclusion is supported further by the Supreme Court's recent opinion in *Price Waterhouse v. Hopkins*, in which the Supreme Court explicitly expressed its reservations about imposing a "clear and convincing" evidentiary burden under Title VII. For these reasons, the Administration opposes the "clear and convincing" burden of proof imposed on employers by S. 436.

PAIN AND SUFFERING AND SIMILAR DAMAGES ARE NOT INCLUDED AS PART OF A "MAKE WHOLE" REMEDY

S. 436 would empower the Department of Labor and the courts to order reinstatement, back pay and lost benefits, as well as compensatory damages. These damages are the same as those available under existing whistleblower programs. The Administration does not oppose these damage provisions, based on its understanding that "compensatory damages" do not authorize "pain and suffering" and similar awards.

PROMPT NOTIFICATION OF THE RESPONSIBLE AGENCY

We support the requirement in any legislation that DOL promptly advise the agency responsible for the administration of a particular Federal safety or health law of the pendency of a whistleblower complaint. We do not agree with the provision provided for in section 7 of S. 436. Under that provision, notification to the concerned agency does not occur until the conclusion of action on the retaliation complaint. This delayed notification will be of little benefit because it may delay that agency's abatement response to the hazard or danger.

* * * *

We appreciate the opportunity to comment on these matters, and would be pleased to answer any further questions you may have. The Office of Management and Budget advises that there is no objection to the submission of this letter from the standpoint of the President's program.

Sincerely,

/s/ Elizabeth Dole
ELIZABETH DOLE

cc: The Honorable Edward Kennedy
The Honorable Orrin Hatch
The Honorable James Jeffords
The Honorable Charles Grassley